SECOND CIRCUIT AND NEW YORK COURT DECISIONS 1995 TO THE PRESENT UNDER THE IDEA AND SECTION 504/A.D.A

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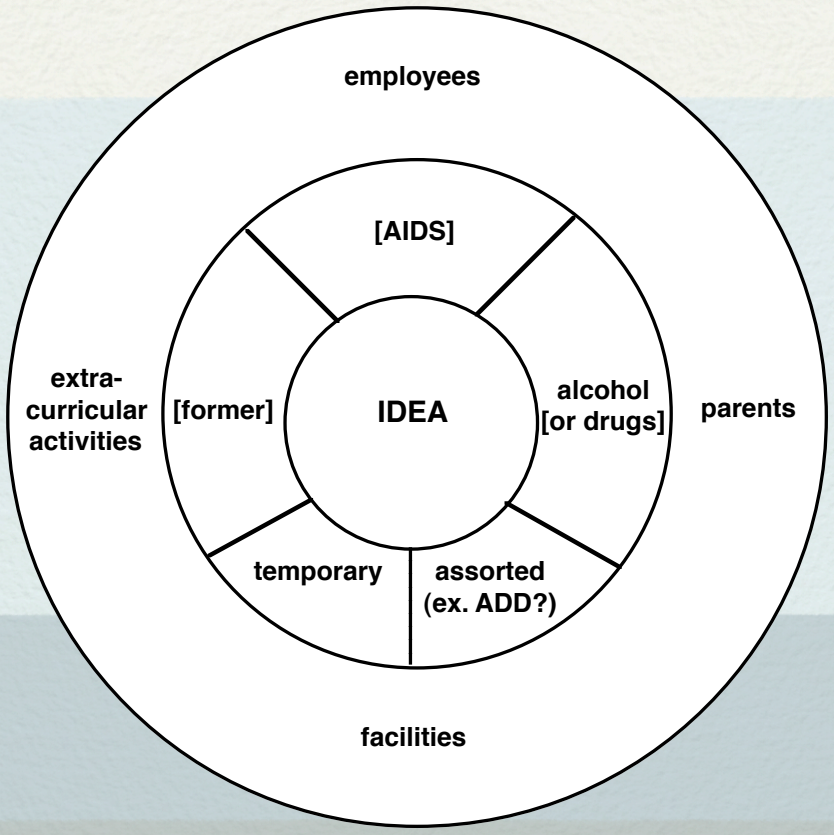

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With the exception of the District of Columbia, New York is the leading jurisdiction in terms of adjudicated impartial hearings under the Individuals with Disabilities Education Act (IDEA).[1] Thus, its impartial hearing officers may find beneficial a ready source of the judicial precedents in their jurisdiction.

This annotated outline is a 12/10/13 compilation of most of the published[2] special education decisions issued by the Second Circuit and the courts in New York starting in 1995.[3] It does not extend, however, to technical adjudicative issues, such as statute of limitations and—with a limited exception—stay-put.[4] Moreover, the coverage of the attorneys' fees cases is only illustrative rather than exhaustive, because they are so numerous and not within the direct province of hearing officers.[5] The author welcomes suggested additions of any missing cases as well as corrections of the citation and blurb for each case within these boundaries.

The case entries are organized in approximate chronological order within common special education categories under the IDEA, starting with eligibility, FAPE, and LRE, and

[1] Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEAD. 22 (2008).

[2] "Published" in this context refers to the narrow meaning of appearing in the official court reporters, with the limited exception of West's Federal Appendix. Thus, this document does not extend to the many decisions reported in Westlaw, Lexis, and IDELR that do not appear in these specified series of volumes. However, for the covered cases, the document provides the parallel citation in IDELR to facilitate flexible access.

[3] Although conveniently extending to more than a decade and a half, this compilation does not extend to earlier major decisions; for example, the Supreme Court's landmark decision, *Board of Education v. Rowley*, 458 U.S. 176 (1982), arose in New York. For a corresponding compilation that extends to all of the other circuits, see PERRY A. ZIRKEL, A NATIONAL UPDATE OF THE CASE LAW 1998 TO PRESENT UNDER THE IDEA AND SECTION 504 (2011) (available at www.nasdse.org).

[4] See, e.g., *Somoza v. New York City Dep't of Educ*., 538 F.3d 106 (2d Cir. 2008); *M.D. v. Southington Bd. of Educ*., 334 F.3d 217 (2d Cir. 2003) (statute of limitations); *Baldessare v. Monroe-Woodbury Cent. Sch. Dist.*, __ F. App'x __ (2d Cir. 2012); *Levine v. Greece Cent. Sch. Dist.*, 353 F. App'x 461 (2d Cir. 2009); *TC v. Valley Cent. Sch. Dist.*, 777 F. Supp. 2d 577 (S.D.N.Y. 2011); *Piazza v. Florida Union Free Sch. Dist*., 777 F. Supp. 2d 669 (S.D.N.Y. 2011); *Alaimo v. Bd. of Educ. of Tri-Valley Cent. Sch. Dist.*, 650 F. Supp. 2d 289 (S.D.N.Y. 2009) (exhaustion); *Lillbask v. Connecticut Dep't of Educ.*, 397 F.3d 77 (2d Cir. 2005) (mootness and jurisdiction); *D.N.v. New York City Dep't of Educ.*, __ F. Supp. 2d __ (S.D.N.Y. 2012) (cross-appeal requirements); *B.J.S. v. New York State Educ. Dep't*, 699 F. Supp. 2d 586 (S.D.N.Y. 2010) (personal jurisdiction over state defendants); *H.M. v. New York City Dep't of Educ*., 583 F. Supp. 2d 498 (S.D.N.Y. 2008) (stay-put in transitioning from Part C to Part B); *Calhoun v. Ilion Cent. Sch. Dist.,* 935 N.Y.S.2d 321 (App. Div. 2011) (§ 504 exhaustion *inter alia*); *Arlington Cent. Sch. Dist. v. State Review Officer*, 741 N.Y.S.2d 276 (App. Div. 2002) (second-tier scope of review when the respondent fails to file an answer).

[5] Although the primary intended audience consists of hearing officers, others are welcome to access this information.

ending with decisions under Section 504 and the ADA.[6] Each entry consists of a standard citation, including the parallel cite in the Individuals with Disabilities Law Reports (IDELR), and a blurb that summarizes the major ruling(s).[7] In addition, prefacing each citation is the outcome for the summarized ruling(s) in terms of these categories: ***P*** = Parent won; ***S*** = School district won; ***P/S*** = mixed (partially in favor of each side); **( )** = Inconclusive.[8]

Those entries representing decisions by the U.S. Supreme Court and Second Circuit are in bold typeface. For decisions that have rulings in more than one category, the second entry has an abbreviated citation ending with "*supra*" (literally meaning "above"), which is a cross reference to the complete citation in the earlier listing.

In addition, to keep the entries brief, the blurbs include the following acronyms:

ABA = applied behavior analysis
ADA = Americans with Disabilities Act
ADHD = attention deficit hyperactivity disorder
BIP = behavior intervention plan
ED = emotional disturbance
FAPE = free appropriate public education
FBA = functional behavioral assessment
IEE = independent educational evaluation
IEP = individualized education program
IHO = impartial hearing officer
LRE = least restrictive environment
OHI = other health impairment
PDD = pervasive developmental disorder
PINS = person in need of supervision
PTSD = post-traumatic stress disorder
SLD = specific learning disabilities
SRO = state review officer

This document is not intended as legal advice or thorough analysis. Listing these brief

[6] These broad categories are inevitably imprecise due to not only overlapping content (e.g., FAPE and LRE) but also multiple issues. In particular, the tuition reimbursement rulings that ended at Step 1 (whether the district's proposed program was appropriate) are listed in the "Appropriate Education" (or FAPE) category, with a bracketed designation showing the overlap, whereas the cases that proceeded to the subsequent steps in the analysis are listed under "Tuition Reimbursement."

[7] Because a few of the cases have more than one major ruling, the frequency distribution in the Table of Contents is in terms of rulings (N=154), not cases (N=143).

[8] "Inconclusive" in this context refers to rulings, such as **(*P*)** = denial of the defendant's motion for dismissal or **(*S*)** = denying the parent's motion for summary judgment. Such court opinions preserve a final decision on the merits of the issue for further proceedings that did not subsequently appear as a published decision. Conversely, if a published decision at the trial court level is succeeded by an appellate decision that is published on specific to the same issue, only the final decision is included herein.

entries as merely a starting point, the author strongly encourages direct reading of the cited cases for careful verification of the citation and independent interpretation of the case contents. For readers who are not attorneys, consultation with competent counsel is recommended.

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I. IDENTIFICATION

P ***Muller v. Comm. on Special Educ*., 145 F.3d 95, 28 IDELR 188 (2d Cir. 1998)**
- student diagnosed with ODD and PTSD and treated as Sec. 504-eligible instead qualified as ED under IDEA [tuition reimbursement case]

P *Corchado v. Bd. of Educ.*, 86 F. Supp. 2d 168, 32 IDELR ¶ 116 (W.D.N.Y. 2000)
- a student with OHI, SLD and speech impairment was eligible under IDEA although achieving at an average level based on the adverse educational effects of his seizure disorder and stuttering

S ***J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 33 IDELR ¶ 34 (2d Cir. 2000)**
- gifted child with emotional/behavioral impairment was not eligible under IDEA due to lack of requisite adverse educational effect [tuition reimbursement case]

P *New Paltz Cent. Sch. Dist. v. St. Pierre*, 307 F. Supp. 2d 394, 40 IDELR ¶ 211 (N.D.N.Y. 2004)
- ruled that substance-abusing ninth grader was eligible as ED (rather than purely socially maladjusted) and that district was liable for tuition reimbursement due to delayed evaluation

S *Mr. N.C. v. Bedford Cent. Sch. Dist*., 473 F. Supp. 2d 532, 47 IDELR ¶ 95 (S.D.N.Y. 2007), ***aff'd*, 300 F. App'x 11, 51 IDELR ¶ 149 (2d Cir. 2008)**
- ruled that sexually abused drug-abusing student did not qualify as ED based on any of the five alternative conditions [tuition reimbursement case]

P *Eschenasy v. New York City Dep't of Educ.*, 604 F. Supp. 2d 639, 52 IDELR ¶ 62 (S.D.N.Y. 2009)
- held that teenager who cut classes, took drugs, stole classmates' property, and engaged in self-injurious behavior was eligible as ED and, thus, to private therapeutic placement [tuition reimbursement case – rec'd 1 of 2 years]

S ***C.B. v. Dep't of Educ.*, 322 F. App'x 20, 52 IDELR ¶ 121 (2d Cir. 2009)**
- ruled that student with ADHD and bipolar disorder was not eligible under the IDEA due to successful "educational performance" (in narrow, academic view)

S *cf. J.A. v. E. Ramapo Sch. Dist.*, 603 F. Supp. 2d 684, 52 IDELR ¶ 196 (S.D.N.Y. 2009)
- misclassification of child as OHI rather than autistic was not substantive flaw entitling the parents to reimbursement for additional 1:1 behavior therapy where they failed to show that the child needed higher allocation of 1:1 as compared to group behavior therapy

S *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 53 IDELR ¶ 327 (E.D.N.Y. 2010)
- ruled that child with Asperger Disorder (and ADHD) was not eligible as under autism classification based on "educational performance" being primarily academic, although the adverse affect need not be severe or significant

S *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 54 IDELR ¶ 10 (S.D.N.Y. 2010)
- ruled that child with various diagnoses, including Asperger Disorder, ADHD, and dysgraphia, was not eligible as OHI or ED based on narrow, academic view of adverse affect on "educational performance"

S *W.G. v. New York City Dep't of Educ.*, 801 F. Supp. 2d 142, 56 IDELR ¶ 230 (S.D.N.Y. 2011)
- ruled that the child was not eligible as ED because his academic downturn was due to social maladjustment, including conduct disorder and truancy [tuition reimbursement case]

S *P.C. v. Oceanside Union Free Sch. Dist.*, 818 F. Supp. 2d 516, 56 IDELR ¶ 252 (E.D.N.Y. 2011)
- ruled that the child did not qualify as ED (and alternatively that the parents' unilateral placement was not appropriate) [tuition reimbursement case]

II. APPROPRIATE EDUCATION[9]

S *Wall v. Mattituck-Cutchogue Sch. Dist.*, 945 F. Supp. 501, 24 IDELR 1162 (E.D.N.Y. 1996)
- upheld substantive appropriateness of partially mainstreamed placement for student with SLD that used parent's proposed method of instruction (Orton-Gillingham) partially, although the unilateral placement used this method exclusively [tuition reimbursement case]

P ***Mrs. B v. Milford Bd. of Educ.*, 103 F.2d 1114, 25IDELR 217 (2d Cir. 1997)**
- held that the district was responsible for the full, not just education, costs of a residential placement where the placement is necessary for the child's educational progress—regardless of whether the placement was for narrowly "non-education" reasons (i.e., home dynamics or emotional problems)

P *Mr. X v. New York State Educ. Dep't*, 975 F. Supp. 546, 26 IDELR 854 (S.D.N.Y. 1997)
- upheld continuation, upon transition from Part C of the IDEA,[10] of home-based, 40-hour per week ABA program for three-year-old child with autism rather than the proposed center-based program that would have provided 25 hours of ABA instruction via an aide

S ***Walczak v. Florida Union Free Sch. Dist.*, 142 F.2d 119, 27 IDELR 1135 (2d Cir. 1998)**
- upheld substantive appropriateness of district's proposed placement of a child with SLD in a day school [tuition reimbursement case]

S *A.S. v. Bd. of Educ.*, 245 F. Supp. 2d 417, 37 IDELR ¶ 179 (D. Conn. 2001), ***aff'd mem.*, 47 F. App'x 615, 37 IDELR ¶ 246 (2d Cir. 2002)**
- upheld proposed IEP for student with SLD, ED, and ADHD at the district's high school, finding the school staff members to be more weighty witnesses than the parents' outside experts [tuition reimbursement case]

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[9] The Supreme Court established the two-part test for FAPE in *Board of Education v. Rowley*, 458 U.S. 176 (1982). The Second Circuit and federal district courts in New York have maintained, with various wording, the substantive standard of whether the IEP is "reasonably calculated to enable the child to received educational benefits?" (p. 206-207). For the procedural standard, the latest amendments and regulations of the IDEA have codified this view of the post-*Rowley* progeny:

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--
> (i) Impeded the child's right to a FAPE;
> (ii) Significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child; or
> (iii) Caused a deprivation of educational benefit.

20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

[10] This annotated outline does not include cases under Part C (formerly Part H) of the IDEA, which concerns children with disabilities ages 0-3. See, e.g., *Malkentzos v. DeBuono*, 102 F.3d 50, 25 IDELR 36 (2d Cir. 1996).

S ***Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 40 IDELR ¶ 2 (2d Cir. 2003)**
- procedural violations of delayed IEPs were not prejudicial after parents' unilateral placement of SLD child, absent evidence they would have returned the child to the district, and district's choice not to use Orton-Gillingham method was within its discretion [tuition reimbursement case]

P *Pawling Cent. Sch. Dist. v. New York State Educ. Dep't*, 771 N.Y.S.2d 572, 40 IDELR ¶ 180 (App. Div. 2004)
- held that IEP was not appropriate due to failure to complete district's recommended testing, lack of measurable goals, absence of description of specially designed instruction, and unilateral change in related services [tuition reimbursement case]

S *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 41 IDELR ¶ 181 (N.D.N.Y. 2004), ***aff'd,* 142 F. App'x 9 (2d Cir. 2005),** *cert. denied*, 546 U.S. 1091 (2006)
- upheld appropriateness of district's IEP for SLD student rather than parents' proposal for placement in private school that offered Orton Gillingham – methodology within discretion of district

S *J.R. v. Bd. of Educ.*, 345 F. Supp. 2d 386, 42 IDELR ¶ 113 (S.D.N.Y. 2004)
- upheld appropriateness of inclusionary class for student with speech/language and other disabilities based on genetic disorder, deferring to hearing officer's progress findings and commenting that "IDEA [does not] entitle … [the student] to the 'best education that money can buy' at the expenditure of the District's finite financial resources" [tuition reimbursement case]

S ***Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 44 IDELR ¶ 89 (2d Cir. 2005)**
- upheld both procedural and substantive appropriateness of district's proposed IEP despite slower timeliness and progress than parents wanted [tuition reimbursement case]

S *Mackey v. Bd. of Educ.*, 373 F. Supp. 2d 292, 44 IDELR ¶ 155 (S.D.N.Y. 2005)(*Mackey V*)
- upheld the appropriateness of IEP for high school student with SLD based on deference to review officer's decision and inconsequential effect of child's classification [tuition reimbursement case]

(***S***) ***D.F. v. Ramapo Cent. Sch. Dist.*, 430 F.3d 595, 44 IDELR ¶ 180 (2d Cir. 2005)**
- reversed and remanded decision that had ordered district to provide at least 10 hours of in-home ABA therapy in the preschool program, requiring the district court to decide whether the hearing and review officers committed reversible error by using post-IEP evidence to determine the substantive appropriateness of the IEP

S *Viola v. Arlington Cent. Sch. Dist.*, 414 F. Supp. 2d 366, 45 IDELR ¶ 39 (S.D.N.Y. 2006)
- upheld both procedural and substantive appropriateness of district's proposed IEP, including meaningful parental participation [tuition reimbursement case]

S ***Cabouli v. Chappaqua Cent. Sch. Dist.*, 202 F. App'x 519, 46 IDELR ¶ 211 (2d Cir. 2006)**
- ruled that the proposed IEP for student with Asperger Disorder and pervasive developmental disorder, although representing an abrupt change to a much more mainstreamed environment, met the substantive standard for appropriateness [tuition reimbursement case]

S ***Mr. B. v. E. Granby Bd. of Educ.*, 201 F. App'x 834, 46 IDELR ¶ 212 (2d Cir. 2006)**; *A.E. v. Westport Bd. of Educ.*, 463 F. Supp. 2d 208, 46 IDELR ¶ 277 (D. Conn. 2006), ***aff'd*, 251 F. App'x 685, 48 IDELR ¶ 270 (2d Cir. 2007)**
- upheld procedural and substantive appropriateness of IEPs [tuition reimbursement cases]

S *W.S. v. Rye City Sch. Dist.*, 454 F. Supp. 2d 134, 46 IDELR ¶ 285 (S.D.N.Y. 2006)
- upheld appropriateness of proposed 50/50 placement of kindergartner with autism in regular school, concluding that FBA was appropriate and district's failure to send out notices to private schools did not constitute pre-determination [tuition reimbursement case]

(***P***) ***Smith v. Guilford Bd. of Educ.*, 226 F. App'x 58, 48 IDELR ¶ 32 (2d Cir. 2007)**
- disability-based peer harassment could constitute denial of FAPE

S ***M.H. v. Monroe-Woodbury Cent. Sch. Dist.*, 250 F. App'x 428 (2d Cir. 2007);** *see also* ***Collins v. Bd. of Educ.*, 164 F. App'x 219, 44 IDELR ¶ 270 (2d Cir. 2006)**
- ruled that the proposed IEP was substantively appropriate, reversing the district court for failing to give due deference to the review officer's decision [tuition reimbursement case]

S *P.K. v. Bedford Cent. Sch. Dist.*, 569 F. Supp. 2d 371, 50 IDELR ¶ 251 (S.D.N.Y. 2008)
- upheld procedural and substantive appropriateness of district's IEP, reasoning that student's alcohol and drug abuse was the problem and that districts are not responsible for alcohol/drug abuse treatment [tuition reimbursement case]

S *M.M. v. New York City Dep't of Educ.*, 583 F. Supp. 2d 498, 51 IDELR ¶ 128 (S.D.N.Y. 2008)
- rejected procedural challenges, including pre-determination, and ruled that district's proposed IEP met substantive standard, which is not maximization of potential, for student with autism [tuition reimbursement case]

S ***A.C. v. Bd. of Educ.*, 553 F.3d 165, 51 IDELR ¶ 147 (2d Cir. 2009)**
- held that IEP for child with autism developed, in violation of state regulation requiring FBA, was neither procedurally nor substantively deficient—IDEA's IEP "special consideration" provision, in effect, trumped state regulation [tuition reimbursement case]

S ***T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 51 IDELR ¶ 176 (2d Cir. 2009)**
- held that consultant chart's "School Response" that showed district did not intend to offer more than 10 hours of school-based ABA did not constitute pre-determination of IEP for kindergarten child with autism [tuition reimbursement case]

S *R.R. v. Scarsdale Union Free Sch. Dist.*, 615 F. Supp. 2d 283, 52 IDELR ¶ 185 (S.D.N.Y. 2009*),* ***aff'd on other grounds*, 366 F. App'x 239 (2d Cir. 2010)**
- rejected various procedural challenges, including pre-determination claim, to child's IEP [tuition reimbursement case]

S *E.G. v. City Sch. Dist.*, 606 F. Supp. 2d 384, 52 IDELR ¶ 228 (S.D.N.Y. 2009)
- rejected parents' pre-determination claim and ruled that district's proposed IEP, which included 10 hours of at-home behavior therapy and 5 half-days in regular education for child with autism, was FAPE in the LRE [tuition reimbursement case]

S ***T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 53 IDELR ¶ 69 (2d Cir. 2009)**, *cert. denied*, 130 S. Ct. 3277 (2010)
- ruled that IEP requirement of "location" refers to type of appropriate environment, not specific school site [tuition reimbursement case]

S ***E.H. v. Bd. of Educ.*, 361 F. App'x 156, 53 IDELR ¶ 141 (2d Cir. 2009),** *cert. denied*, 130 S. Ct. 2064 (2010)
- ruled that district did not deny FAPE by placing student with PDD in class of 12, rather than 6, other students and did not deny parents meaningful participation in development of the IEP

S *J.G. v. Briarcliff Manor Union Free Sch. Dist.*, 682 F. Supp. 2d 387, 54 IDELR ¶ 20 (S.D.N.Y. 2010)
- ruled that 1) parents had meaningful opportunity to participate in IEP development despite goals/objectives drafted after (and outside) the initial meeting, short notice for next meeting, and parents' absence from that meeting and 2) IEP sufficiently addressed the child's needs [tuition reimbursement case]

S *Adrianne D. v. Lakeland Cent. Sch. Dist.*, 686 F. Supp. 2d 361, 54 IDELR ¶ 95 (S.D.N.Y. 2010)
- ruled that progress in reading of sixth grader, although he did not fulfill of 10 goals in reading and 2 of 7 in writing, met substantive standard for FAPE [tuition reimbursement case]

S ***K.L.A. v. Windham Se. Supervisory Unit*, 371 F. App'x 151, 54 IDELR ¶ 112 (2d Cir. 2010)**
- rejected parent's FAPE procedural challenges that were based on partial absence of the regular education teacher at IEP meetings and denial of meaningful parental participation and also adopted district-deferential view of LRE in relation to its proposed placement of student with pervasive developmental disorder in high school's "life education" class

S *M.N. v. New York City Dep't of Educ.*, 700 F. Supp. 2d 356, 54 IDELR ¶ 165 (S.D.N.Y. 2010)
- held that procedural violations (e.g., lack of FBA) did not deny FAPE and that the IEP for five-year-old at public charter school for children with autism (per ABA model) met the substantive standard w/o the parents' additionally sought itinerant services

S ***Bougades v. Pine Plains Cent. Sch. Dist.*, 376 F. App'x 95, 54 IDELR ¶ 181 (2d Cir. 2010)**
- upheld substantive appropriateness of IEP for child with SLD in challenged areas of homework assignments and writing—deference to hearing/review officers [tuition reimbursement case]

S *W.T. v. Bd. of Educ*., 716 F. Supp. 2d 270, 54 IDELR ¶ 192 (S.D.N.Y. 2010)
- upheld procedural and substantive appropriateness of IEP, despite possible violation of state regulations for the age range within a class, based on deference to review officer [tuition reimbursement case]

S *M.F. v. Irvington Union Free Sch. Dist.,* 719 F. Supp. 2d 302, 54 IDELR ¶ 288 (S.D.N.Y. 2010)
- ruled that various procedural violations did not amount to denial of FAPE and that strict four-corners rule did not apply where child with SLD received services reasonably calculated to meet his needs [tuition reimbursement case]

S ***A.H. v. Dep't of Educ. of New York City*, 394 F. App'x 718, 55 IDELR ¶ 36 (2d Cir. 2010)**
- failure to properly constitute child's IEP team was not prejudicial procedural violation [tuition reimbursement case]

S *M.S. v. New York City Dep't of Educ.*, 734 F. Supp. 2d 271, 55 IDELR ¶ 40 (E.D.N.Y. 2010)[11]
- upheld substantive appropriateness of IEP for child with autism, including transition provision to return the child from private school and use of shorthand descriptors in BIP [tuition reimbursement case]

P/S *E.S. v. Katonah Lewisboro Sch. Dist.*, 742 F. Supp. 2d 417, 55 IDELR ¶ 130 (S.D.N.Y. 2010), ***aff'd*, __ F. App'x __, 59 IDELR ¶ 63 (2d Cir. 2012)**
- upheld appropriateness of first but not second of two successive IEPs for student with schizoaffective disorder and borderline intellectual functioning, concluding that the second IEP did not sufficiently take into account the progress data from the first year of the child's unilateral placement [tuition reimbursement case]

[11] The Second Circuit affirmed this decision after consolidating it with another case, which is listed herein under Tuition Reimbursement. ***M.H. v. New York City Dep't of Educ*., 685 F.3d 217, 59 IDELR ¶ 62 (2d Cir. 2012)**.

S *D.G. v. Cooperstown Cent. Sch. Dist.*, 746 F. Supp. 2d 435, 55 IDELR ¶ 155 (N.D.N.Y. 2010)
- upheld appropriateness of two successive IEPs that provided for a co-teaching mixed setting with multi-sensory reading instruction rather than the Wilson program that the parents' unilateral placement utilized [tuition reimbursement case]

S *C.G. v. New York City Dep't of Educ.*, 752 F. Supp. 2d 355, 55 IDELR ¶ 157 (S.D.N.Y. 2010)
- upheld discontinuation of 15 hours per week of ABA after-school services based on substantive appropriateness of the IEP at a private day school w/o such services [tuition reimbursement case]

S *E.Z.-L v. New York City Dep't of Educ.*, 763 F. Supp. 2d 584, 56 IDELR ¶ 10 (S.D.N.Y. 2011)[12]
- upheld appropriateness of district's proposed IEP, including placement (which is not "bricks and mortar"), of child with autism both procedurally (specifically, parental participation and FBA-BIP) and substantively (specifically, omission of parent training/counseling and transition plan, contrary to state law requirement, was not fatal where the district provided such services as needed) [tuition reimbursement case]

(*P*) *T.K. v. New York City Dep't of Educ.*, 779 F. Supp. 2d 289, 56 IDELR ¶ 228 (S.D.N.Y. 2011)
- rejected parents' pre-determination claim but remanded the case for further proceedings on their bullying claim, ruling that "under IDEA the question to be asked is whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities" [tuition reimbursement case]

P *Bd. of Educ. v. Schaefer*, 923 N.Y.S.2d 579, 56 IDELR ¶ 234 (App. Div. 2011)
- upheld denial of FAPE based on district significantly impeding parents' opportunity to participate in IEP meetings

S *C.T. v. Croton-Harmon Union Free Sch. Dist.*, 812 F. Supp. 2d 420, 57 IDELR ¶ 37 (S.D.N.Y. 2011)
- ruled that 1) absence of private school special education representatives on the IEP team and lack of an FBA were not prejudicial, 2) the mainstreamed IEP met the *Rowley* substantive standard, 3) the student, classified as ED, no longer needed the residential placement [tuition reimbursement case]

S *A.L. v. New York City Dep't of Educ.*, 812 F. Supp. 2d 492, 57 IDELR ¶ 69 (E.D.N.Y. 2011)
- rejected parent's various procedural and substantive claims of denial of FAPE for student with autism, including parental participation, FBA-BIP, and transition plan [tuition reimbursement case]

[12] As separately listed *infra* in this section, the Second Circuit affirmed this decision after consolidation with two other cases. ***R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 59 IDELR ¶ 241 (2d Cir. 2012).**

S *B.O. v. Cold Spring Harbor Cent. Sch. Dist.*, 807 F. Supp. 2d 130, 57 IDELR ¶ 130 (E.D.N.Y. 2011)
- upheld procedural and substantive appropriateness of district's proposed IEP for student with SLD, cautioning the IHO that *Rowley* deference to school authorities only applies at the court level [tuition reimbursement case]

P *J.S. v. Scarsdale Union Free Sch. Dist.*, 826 F. Supp. 2d 635, 58 IDELR ¶ 16 (S.D.N.Y. 2011)
- ruled, *inter alia*, that the district's proposed placement was not appropriate even though the parties agreed that the IEP was appropriate [tuition reimbursement case]

S *B.P. v. New York City Dep't of Educ.*, 841 F. Supp. 2d 605, 58 IDELR ¶ 74 (E.D.N.Y. 2012)
- upheld procedural and substantive appropriateness of IEP for student with SLD [tuition reimbursement case]

S *M.W. v. New York City Dep't of Educ.*, 869 F. Supp. 2d 320, 59 IDELR ¶ 36 (E.D.N.Y. 2012)
- upheld procedural and substantive appropriateness of district's proposed IEP for nine-year-old with autism, ADHD, and Tourette syndrome [tuition reimbursement case]

S *E.W.K. v. Bd. of Educ.*, __ F. Supp. 2d __, 59 IDELR ¶ 166 (S.D.N.Y. 2012)
- upheld substantive appropriateness of IEPs for SLD middle-school student based on evidence of progress despite lack of specialized reading program, refusing to speculate on the impact of private tutoring in reading [tuition reimbursement case]

P/S ***R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 59 IDELR ¶ 241 (2d Cir. 2012)**
- adopting the snapshot approach but not strict four-corners rule and differentiating between serious (FBA) and minor (parent counseling) procedural violations based on state standards for FAPE analysis, reached mixed outcomes in three consolidated cases concerning students with autism (two for district and one in favor of the parent, including tuition reimbursement)

S *T.M. v. Cornwall Cent. Sch. Dist.*, __ F. Supp. 2d __, 59 IDELR ¶ 286 (S.D.N.Y. 2012)
- ruled that the absence of a FBA/BIP did not amount to denial of FAPE in this case and that the IEP's segregated ESY program for a child mainstreamed during the school year was not a violation of the IDEA, because a district that does not operate a mainstream educational program during the summer months is not obligated to create one simply to satisfy the LRE requirements of the IDEA [tuition reimbursement case]

S *R.C. v. Byram Hills Sch. Dist.*, __ F. Supp. 2d __, 60 IDELR ¶ __ (S.D.N.Y. 2012)

- upheld appropriateness of proposed consecutive one-year IEPs, which initially provided 8:1:1 for math and language arts, one period of resource room, and a 3:1 aide for general education in addition to various related services (48 goals total) and which during the second year increased the special ed class size to 12:1 and removed the aide, for 14-year-old student with SLD—no prejudicial procedural violations (e.g., lack of BIP and, in light of LRE preference, class size); failure to implement resource room in year one every sixth day and providing 45-minute rather than 60-minute resource room periods each was de minimis (i.e., not material failure); and substantively at the requisite non-ideal level [tuition reimbursement case]

P *B.R. v. New York City Dep't of Educ.,* __ F. Supp. 2d __, 60 IDELR ¶ 102 (S.D.N.Y. 2012)

- ruled (in agreement with IHO, not RO) that the proposed placement was not appropriate because it would not provide the student, a nine-year old with autism, with her IEP-specified 1:1 OT services (thus not reaching the parent's alternate arguments re the lack of a sensory gym or highly qualified special education teacher)—snapshot approach (which IHO and RO had not followed) [tuition reimbursement case]

III. MAINSTREAMING/LRE

S ***Walczak v. Florida Union Free Sch. Dist.* (*supra*)**; *see also* ***M.H. v. Monroe-Woodbury Cent. Sch. Dist.*, 296 F. App'x 126, 51 IDELR ¶ 91 (2d Cir. 2008)**, *cert. denied*, 129 S. Ct. 1584 (2009)(upheld day school placement where residential placement was not educationally necessary)

- upheld appropriateness of district's proposed placement in special education class rather than residential placement [tuition reimbursement case]

P ***Muller v. Comm. on Special Educ.* (*supra*)**

- upheld residential placement under IDEA rather than district's mainstreamed placement under Sec. 504 plan ([tuition reimbursement case]

S ***St. Johnsbury Academy v. D.H.*, 240 F.3d 163, 34 IDELR ¶ 32 (2d Cir. 2001)**

- private school's fifth-grade-achievement-level requirement for mainstreaming does not violate IDEA (nor Sec. 504)

P *Jennifer D. v. New York City Dep't of Educ.*, 550 F. Supp. 2d 420, 50 IDELR ¶ 93 (S.D.N.Y. 2008)

- rejected proposed placement of student with ADHD in small class in public high school for students with ED as not FAPE in the LRE (w/o adopting and applying separate LRE test) as compared to placement in small class in regular high school based on improved behavior [tuition reimbursement case]

P/S ***P. v. Newington Bd. of Educ.*, 546 F.3d 111, 51 IDELR ¶ 2 (2d Cir. 2008)**

- upheld hearing officer's decision in favor of the district's 74% mainstreaming for 2005-06 for 9-year-old with intellectual disabilities and her order for inclusion consultant for one year as compensatory education for LRE violation (60% mainstreaming) for 2004-05

S *Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist.*, 583 F. Supp. 2d 422, 51 IDELR ¶ 94 (W.D.N.Y. 2008)

- upheld review officer's decision that district's placement of fifth grader with SLD in special education class for most of the day was the LRE rather than the specialized day school that the parents' sought—not a prejudicial procedural error and supported by evidence that the child displayed emotional difficulties at home, not at school

S *J.S. v. N. Colonie Cent. Sch. Dist.*, 586 F. Supp. 2d 74, 51 IDELR ¶ 150 (N.D.N.Y. 2008)

- upheld removal of high school student with autism to a self-contained class as meeting the *Oberti* factors

P *G.B. v. Tuxedo Union Free Sch. Dist.*, 751 F. Supp. 2d 552, 55 IDELR ¶ 228 (S.D.N.Y. 2010)

- held that district's successive placements for 8-year-old with PDD violated the two-part test for LRE [tuition reimbursement case]

IV. RELATED SERVICES AND ASSISTIVE TECHNOLOGY

P ***Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 29 IDELR 966 (1999)**
- specialized health care services that do not require a physician and are necessary for an IDEA-eligible student are related, not medical, services

P *Bd. of Educ. v. Thomas K.*, 926 N.E.2d 250, 54 IDELR ¶ 125 (N.Y. 2010) (1:1 aide as related service per dual enrollment statute); *Bd. of Educ. v. Kain*, 875 N.Y.S.2d 239, 52 IDELR ¶ 75 (App. Div. 2009) (case-by-case basis under state law depending on necessity); *Richard K. v. Petrone*, 815 N.Y.S.2d 270 (App. Div. 2006) (state health and welfare law). *But cf. Bay Shore Union Free Sch. Dist. v. T.*, 405 F. Supp. 2d 230 (E.D.N.Y. 2005), ***vacated*, 485 F.3d 730, 47 IDELR ¶ 243 (2d Cir. 2007)** (dismissed for lack of jurisdiction)
- mixed results as to district's obligation to provide related services to students with disabilities in private schools under state law

S *Roslyn Union Free Sch. Dist. v. University of the State of New York*, 711 N.Y.S.2d 582, 33 IDELR ¶ 2 (N.Y. App. Div. 2000)
- ruled that district was not obligated under the IDEA to provide transportation home from eligible child's private after-school program where that program was not necessary for him to receive FAPE, even though the district's after-school program was not appropriate and included transportation home

S ***Nishanian v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87, 39 IDELR ¶ 181 (2d Cir. 2003)**
- ruled that TI-82 calculator, rather than the TI-92 that the parents' demanded and that did factoring of polynomials, was appropriate for SLD high school junior even though he failed the course without the TI-92 (due to lack of effort, as determined by hearing and review officers)

V. DISCIPLINE ISSUES

P *LIH v. New York City Bd. of Educ.*, 103 F. Supp. 2d 658, 33 IDELR ¶ 1 (E.D.N.Y. 2000)
- issued preliminary injunction to the effect that the IDEA disciplinary protections apply during summer school

S *Roslyn Union Free Sch. Dist. v. Geffrey W.*, 740 N.Y.S.2d 451, 36 IDELR ¶ 239 (App. Div. 2002)
- granted *Honig* injunction for homebound placement of dangerous middle school student pending completion of psychiatric evaluation and IEP team review

(*P*) *Coleman v. Newburgh Enlarged City Sch. Dist.*, 319 F. Supp. 2d 446, 41 IDELR ¶ 126 (S.D.N.Y. 2004)
- granted preliminary injunction against two-month suspension of student with SLD based on questionable manifestation determination – not sufficiently considered disability-related taunting that led to the altercation and lack of FBA despite IEP team's recommendation (which should have triggered at least greater scrutiny)

S *In re Charles U.*, 837 N.Y.S.2d 356 (App. Div. 2007); *In re Beau II*, 715 N.Y.S.2d 686, 33 IDELR ¶ 180 (2000); *cf. In re Erich D.*, 767 N.Y.S.2d 488, 40 IDELR ¶ 96 (N.Y. App. Div. 2003). *But see In re Doe*, 753 N.Y.S.2d 656 (N.Y. Family Ct. 2002)

- ruled that PINS petition, which is a status rather than criminal offense, does not trigger IDEA procedural safeguards where its purpose, to obtain probation department monitoring, was to reinforce, not alter, the child's educational placement

VI. ATTORNEYS' FEES

A. ELIGIBILITY

S ***Vultaggio v. Bd. of Educ.*, 343 F.3d 598, 39 IDELR ¶ 261 (2d Cir. 2003)**

- ruled that prevailing parents in state complaint resolution process are not entitled to attorneys' fees (because it is not an "action or proceeding")

S ***S.N. v. Pittsford Cent. Sch. Dist.*, 448 F.3d 601, 45 IDELR ¶ 270 (2d Cir. 2006); *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 28 IDELR 846 (2d Cir. 1998)**

- ruled that parent-attorneys who represent their children in IDEA actions are not eligible to receive attorneys' fees if they prevail

B. "PREVAILING"

S ***Mr. L. v. Sloan*, 449 F.3d 405 (2d Cir. 2006); *J.C. v. Reg'l Sch. Dist.*, 278 F.3d 119, 36 IDELR ¶ 31 (2d Cir. 2002)**; *J.S. v. Ramapo Cent. Sch. Dist.*, 165 F. Supp. 2d 530, 35 IDELR ¶ 185 (S.D.N.Y. 2001)

- rejected "catalyst theory" under IDEA based on Supreme Court's ADA decision in *Buckhannon* (2001)

P ***V.G. v. Auburn Enlarged Cent. Sch. Dist.*, 349 F. App'x 582, 53 IDELR ¶ 140 (2d Cir. 2009)**

- ruled that parents were entitled to attorneys' fees as prevailing party under *Buckhannon* based on private settlement that the hearing officer approved via a consent decree

P/S *J.G. v. Kiryas Joel Union Free Sch. Dist.*, 843 F. Supp. 2d 394, 59 IDELR ¶ 79 (S.D.N.Y. 2012)

- ruled that parents, who sought tuition reimbursement and won on LRE issue at Step 1 but lost overall based on Step 2, were not prevailing party but that their motion for attorneys' fees was not frivolous; thus, neither party was entitled to attorneys' fees

C. SCOPE

P/S *Mr. X v. New York State Educ. Dep't*, 20 F. Supp. 2d 561, 29 IDELR 705 (S.D.N.Y. 1998); *see also* ***I.B. v. New York City Dep't of Educ.*, 336 F.3d 79, 39 IDELR ¶ 155 (2d Cir. 2003)**

- upheld Wall Street attorney's billing rule of $350-$375 per hour but reduced award 20% to $147k in light of excessive and duplicative time entries

S ***Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 45 IDELR ¶ 267 (2006)**

- held that IDEA does not allow for prevailing parents to recover expert fees

P/S *E.S. v. Katonah-Lewisboro Sch. Dist.*, 796 F. Supp. 2d 421, 56 IDELR ¶ 231 (S.D.N.Y. 2010), ***aff'd*, __ F. App'x __, 59 IDELR ¶ 63 (2d Cir. 2012)**

- reduced requested total from $289k to $157k based on unreasonable rates and unreasonable billing, but not for obtaining only one of two years of requested tuition reimbursement

VII. REMEDIES

A. TUITION REIMBURSEMENT[13]

P/S *Connors v. Mills*, 34 F. Supp. 2d 795, 29 IDELR 946 (N.D.N.Y. 1998)

- a parent may be entitled to tuition reimbursement on a prospective basis where they cannot afford to "front" the costs, at least where the *Burlington* prerequisites are met or the district agrees it cannot provide the student with FAPE

(*P*)/*S* ***M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 33 IDELR ¶ 91 (2d Cir. 2000)**

- remanded tuition reimbursement decision to determine appropriateness of district's program before reaching appropriateness of the unilateral placement, but barred reimbursement, based on equities, for costs of child's psychological treatment where parents failed to raise the issue until after the treatment ended

S ***M.S. v. Bd. of Educ.*, 231 F.3d 96, 33 IDELR ¶ 183 (2d Cir. 2000)**

- ruled against reimbursement for private LD school based on objective evidence of progress and LRE as a consideration

P *Wolfe v. Taconic-Hills Cent. Sch. Dist.*, 167 F. Supp. 2d 530, 35 IDELR ¶ 186 (N.D.N.Y. 2001)

- rejected review officer's denial of tuition reimbursement because his equitable factors lacked sufficient factual foundation

[13] For a more detailed and systematic analysis geared to the published case law in New York and the Second Circuit, see the Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA*, __ EDUC. L. REP. __ (in press).

P ***Mackey v. Bd. of Educ.*, 112 F. App'x 89 (2d Cir. 2004); *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 37 IDELR ¶ 62 (2d Cir. 2002)**, *aff'd on other grounds*, 548 U.S. 291, 45 IDELR ¶ 267 (2006); ***Bd. of Educ. v. Schutz*, 290 F.3d 476, 36 IDELR 261 (2d Cir. 2002)**; *Arlington Cent. Sch. Dist. v. J.H.*, 421 F. Supp. 2d 692, 45 IDELR ¶ 123 (S.D.N.Y. 2006); *Bd. of Educ. v. O'Shea*, 353 F. Supp. 2d 306, 42 IDELR ¶ 202 (S.D.N.Y. 2005); *cf.* ***Mackey v. Bd. of Educ.*, 386 F.3d 158, 42 IDELR ¶ 2 (2d Cir. 2004)** (as of the due date—not, if later, the actual date—of the state-level administrative decision)

- ruled that district was responsible to "front" the funds necessary for continued private placement once a state-level administrative or judicial decision supports the appropriateness, subject to further review, in a unilateral placement case (i.e., stay-put applies to tuition reimbursement starting with N.Y. review officer decision in favor of the parents)

S *Werner v. Clarkstown Cent. Sch. Dist.*, 363 F. Supp. 2d 656, 43 IDELR ¶ 59 (S.D.N.Y. 2005)

- held that district's failure to provide the parents with adequate opportunity to explore its proposed residential program was a fatal procedural flaw but that the inappropriateness of the parents' unilateral placement (lack of any special education or related services) and the equities (sham cooperation with district) defeated their claim for tuition reimbursement

P/S *Gabel v Bd. of Educ.*, 368 F. Supp. 2d 313, 43 IDELR ¶ 137 (S.D.N.Y. 2005)

- held that parents sustained their burden of proof as to the appropriateness of the unilateral placement and that the equities supported tuition reimbursement, but related services were solely within the jurisdiction of IHO and the state's commissioner of education, not the courts

S ***P.S. v. Brookfield Bd. of Educ.*, 186 F. App'x 79 (2d Cir. 2006)**

- upheld district's proposed evaluation and, absent specific proof otherwise, the qualifications of its evaluator, thereby affirming the denial of tuition reimbursement where parents did not allow the district a reasonable opportunity to evaluate their child

S *Carmel Cent. Sch. Dist. v. V.P.*, 373 F. Supp. 2d 402, 43 IDELR ¶ 218 (S.D.N.Y. 2005), ***aff'd mem.*, 192 F. App'x 62 (2d Cir. 2006)**

- denied tuition reimbursement on alternate equitable grounds—first, that the parents did not give the district a realistic opportunity to evaluate their child and formulate FAPE and second, that they did not cooperate with the district

P ***Frank G. v. Bd. of Educ.*, 459 F.3d 356, 46 IDELR ¶ 33 (2d Cir. 2006)**

- upheld appropriateness of parents' unilateral placement based on child's progress[14]

[14] In this decision and subsequent ruling, ***Bd. of Educ. v. Tom F.*, 193 F. App'x 26 (2d Cir. 2006)**, *aff'd by an equally divided Court*, 552 U.S. 1 (2007), the Second Circuit also adopted the view that the Supreme Court endorsed nationally in 2009 in *Forest Grove infra*.

S ***Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 48 IDELR ¶ 1 (2d Cir. 2007)**
- where district's proposed placement of student with Asperger Disorder in relatively distant approved private day school was not FAPE in the LRE, at the second step court rejected appropriateness of unilateral placement in neighborhood prep school—despite student's progress—as not targeted to his identified needs

S ***Matrejek v. Brewster Cent. Sch. Dist.*, 293 F. App'x 20, 50 IDELR ¶ 271 (2d Cir. 2008)**; *Pinn v. Harrison Cent. Sch. Dist.*, 473 F. Supp. 2d 477, 47 IDELR ¶ 133 (S.D.N.Y. 2007)
- denied tuition reimbursement where parents failed to prove that their unilateral placement was appropriate (including LRE in second case)

(*P*) ***Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 52 IDELR ¶ 151 (2009)**
- child's lack of previous enrollment in special education is not a categorical bar to tuition reimbursement, instead being one of the various equities

S *S.W. v. New York City Dep't of Educ.*, 646 F. Supp. 2d 346 (S.D.N.Y. 2009)
- ducked deciding whether IDEA permits direct tuition payment to the private school retroactively, where the equities, especially lack of timely notice, weighed against the parents

P *A.D. v. Bd. of Educ.*, 690 F. Supp. 2d 193, 54 IDELR ¶ 9 (S.D.N.Y. 2010)
- ruled, contrary to review officer, that the parents' unilateral placement of child with autism was appropriate (including responsibility for inadequate evaluation being the district's) and that they were entitled to tuition reimbursement

S *Schreiber v. E. Ramapo Cent. Sch. Dist.*, 700 F. Supp. 2d 529, 54 IDELR ¶ 161 (S.D.N.Y. 2010)
- denied tuition reimbursement based on inappropriateness of parents' unilateral placement, including LRE as one consideration

P/S *R.B. v. New York City Dep't of Educ.*, 713 F. Supp. 2d 235, 54 IDELR ¶ 223 (S.D.N.Y. 2010)
- rejected reimbursement for $29,700 prep school placement as inappropriate for child's needs, but ordered reimbursement for $13,800 supplemental special education program because district's lack of proposed placement for child with SLD excused parent's lack of timely notice

P *E.Z.-L. v. New York City Dep't of Educ.* (*supra*)
- rejected defendant-district's unjust-enrichment counterclaim, upon tuition reimbursement decision in its favor, for recoupment of tuition paid during stay-put, "given that both binding and non-binding case law is to the contrary"

P *Mr. A. v. New York City Dep't of Educ.*, 769 F. Supp. 2d 403, 56 IDELR ¶ 42 (S.D.N.Y. 2011)
- upheld direct tuition payment relief to parents who met the three-part test for reimbursement but had not paid the tuition due to inability to afford it

S *J.G. v. Kiryas-Joel Union Free Sch. Dist.*, 777 F. Supp. 2d 606, 56 IDELR ¶ 200 (S.D.N.Y. 2011)
- held that district's self-contained program was too restrictive for five-year-old with multiple disabilities but the unilateral placement at orthodox religious school was also inappropriate (e.g., staff training and curriculum)

S *Davis v. Wappingers Cent. Sch. Dist.*, 772 F. Supp. 2d 500, 56 IDELR ¶ 248 (S.D.N.Y. 2011), ***aff'd*, 431 F. App'x 12, 56 IDELR ¶ 248 (2d Cir. 2011); *cf. R.S. v. Lakeland Cent. Sch. Dist.*, 471 F. App'x 77, 59 IDELR ¶ 32 (2d Cir. 2012)**
- denied tuition reimbursement because, although the district's proposed IEP was procedurally and substantively deficient, the private school program was not appropriate (based on lack of progress and, thus, not purely prospective evidence)

S *R.E. v. New York City Dep't of Educ.*, 785 F. Supp. 2d 28 (S.D.N.Y. 2011), ***rev'd on other grounds*, 694 F.3d 167, 59 IDELR ¶ 241 (2d Cir. 2012)**; *cf. G.B. v. Tuxedo Union Free Sch. Dist*. (*supra*) (reduced reimbursement)
- denied tuition reimbursement based on lack of timely notice

S *Weaver v. Millbrook Cent. Sch. Dist.*, 812 F. Supp. 2d 514, 57 IDELR ¶ 126 (S.D.N.Y. 2011)
- upheld, with due deference, review officer's determination that parent's private placement was not appropriate

P/S *W.M. v. Lakeland Cent. Sch. Dist.*, 783 F. Supp. 2d 497, 57 IDELR ¶ 137 (S.D.N.Y. 2011)
- granted partial tuition reimbursement based on balancing of the equities

P *P.K. v. New York City Dep't of Educ.*, 819 F. Supp. 2d 90, 57 IDELR ¶ 139 (E.D.N.Y. 2011)
- upheld direct retroactive payment of tuition after finding that the proposed IEP for preschool child with autism lacked sufficient specially designed instruction (1:1 ABA) and related services (speech therapy and parent training per state regulation) and that the parent's unilateral placement was appropriate

P/S *J.S. v. Scarsdale Union Free Sch. Dist.* (*supra*)
- reduced tuition reimbursement by 75% based on detailed balancing of the equities, including parent's lack of timely notice (after ruling that the district's proposed placement was not, and parent's unilateral placement was, appropriate)

P ***M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 59 IDELR ¶ 62 (2d Cir. 2012)**
- upheld $80,000 tuition reimbursement for kindergarten child with autism based on finding that child needed extensive 1:1 discrete-trial ABA services, which district's proposed 6:1 placement did not provide and which conformed to LRE consideration for the parent's unilateral private placement—deference to IHO rather than review officer where "more thorough and careful reasoning"

P ***E.S. v. Katonah-Lewisboro Sch. Dist. (supra)***
- upheld reimbursement for second year based on progress in private school (and equitable considerations)

S *T.M. v. Kingston City Sch. Dist.*, __ F. Supp. 2d __, 59 IDELR ¶ 254 (N.D.N.Y. 2012)
- ruled that parent was not entitled to tuition reimbursement where 1) student earned, though had not received, high school diploma at the time of the unilateral placement (thus, no longer eligible) and 2) the parents withheld the previous private school's transcript, which unreasonably prevented determination of the student's graduation status

P *B.R. v. New York City Dep't of Educ.* (*supra*)
- ruled that parent was entitled to reimbursement of $92k annual tuition for day-school for child with autism based on the equities—although parents made clear their desire to keep the child at the private school, they cooperatively participated at every step of the of the district's belated placement process

S ***D.D.-S. v. Southold Union Sch. Dist.*, __ F. App'x __, 60 IDELR ¶ 94 (2d Cir. 2012)**
- affirmed denial of tuition reimbursement for child with SLD based on inappropriateness, including restrictiveness, of residential placement

S *C.L. v. Scarsdale Union Free Sch. Dist.*, __ F. Supp.2d __, 60 IDELR ¶ 103 (S.D.N.Y. 2013)
- upheld denial of tuition reimbursement, ruling that evidence of progress alone is not sufficient to show appropriateness of the unilateral placement due to LRE [15]

[15] The court reasoned that "{the child] also could have progressed in a more mainstream environment. . . . The distinction is important, because presumably any student—disabled or not—would make progress in a small, nurturing, academic environment with a tailored curriculum." *Id*. at __.

B. COMPENSATORY EDUCATION[16]

(*P*) *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 78 F. Supp. 2d 138, 31 IDELR ¶ 183 (W.D.N.Y. 1999)
- granted preliminary injunction to require, as compensatory education, district to "front" tuition at college for student with multiple disabilities to obtain a high school diploma

S *Wenger v. Canastota Cent. Sch. Dist.*, 979 F. Supp. 147, 26 IDELR 1128 (N.D.N.Y. 1997**), *aff'd*, 181 F.3d 84, 32 IDELR ¶ 64 (2d Cir. 2000)**
- denied compensatory education under IDEA where denial of FAPE did not result in regression (equitable remedy - deference to state-level review officer)

P ***P. v. Newington Bd. of Educ.* (*supra*).** *But cf. J.A. v. E. Ramapo Cent. Sch. Dist.* (*supra*) (gross-violation standard applies generally)
- upheld compensatory education award of inclusion consultant for LRE violation, implicitly interpreting Second Circuit's gross-violation standard only to apply to plaintiff-students who are, at the remedial stage, above age 21

P/S Streck v. Bd. of Educ., 642 F. Supp. 2d 105, 52 IDELR ¶ 285 (N.D.N.Y. 2009), ***modified*, 408 F. App'x 411, 55 IDELR ¶ 216 (2d Cir. 2010)**
- ordered escrow account for $37,778 for compensatory reading services in addition to partial reimbursement for tuition (and laptop) at postsecondary institution for reading and writing remediation—in contrast with parents' requested past and prospective reimbursement of $150,000 for tuition, room, and board

S ***French v. New York State Educ. Dep't*, 476 F. App'x 468, 57 IDELR ¶ 241 (2d Cir. 2011)**
- rejected compensatory education where gross denial of FAPE was due to parent's obstructionist actions rather than district's procedural violations

[16] For a more detailed and national treatment, see, e.g., Perry A. Zirkel, *Compensatory Education under the IDEA: An Annotated Update of the Law*, 151 EDUC. L. REP. 501 (2010).

C. TORT-TYPE DAMAGES

(*P*) *R.B. v. Bd. of Educ.*, 99 F. Supp. 2d 411, 32 IDELR ¶ 226 (S.D.N.Y. 2000); *Cappillino v. Hyde Park Cent. Sch. Dist.*, 40 F. Supp. 2d 513, 30 IDELR 253 (S.D.N.Y. 1999); *cf. Butler v. S. Glens Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414, 33 IDELR ¶ 3 (N.D.N.Y. 2000)
- upheld possibility of compensatory damages under Sec. 1983/IDEA

S ***Polera v. Bd. of Educ.*, 288 F.3d 478 (2d Cir. 2002); *Wenger v. Canastota Cent. Sch. Dist.* (*supra*)**; *Butler v. S. Glens Falls Sch. Dist.* (*supra*)
- no compensatory damages under IDEA directly

VIII. OTHER, IDEA-RELATED ISSUES

P *Sackets Harbor Cent. Sch. Dist. v. Munoz*, 725 N.Y.S.2d 119, 34 IDELR ¶ 227 (N.Y. Sup. Ct. App. Div. 2001)
- held that when IEP teams decide matters by vote, all members are entitled to vote, including those invited by the parents or district who have special knowledge or special expertise regarding the child

P/S ***Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 38 IDELR ¶ 32 (2d Cir. 2002)**
- ruled that noncustodial parent was entitled to access to child's records under the IDEA (but no right to challenge IEP under IDEA or for FERPA claims)

S ***Schaffer v. Weast*, 546 U.S. 49, 44 IDELR ¶ 150 (2005)**; *cf.* ***Gagliardo v. Arlington Cent. Sch. Dist.* (*supra*)** (interpreted *Schaffer* as putting burden of proof on every *Burlington* factor on—in almost every case—the parents)[17]
- ruled that the burden of proof (specifically, burden of persuasion) in a case challenging the appropriateness of an IEP is on the challenging party

(*P*) ***Connecticut Office of Protection & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.,* 464 F.3d 229, 46 IDELR ¶ 121 (2d Cir. 2006)**
- held that advocacy organization may obtain access for interviews and observations) students with disabilities as part of its investigation of alleged violations of IDEA

(*P*) ***D.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 46 IDELR ¶ 181 (2d Cir. 2006), *amended*, 480 F.3d 138 (2d Cir. 2007)**
- rejected substantial-compliance standard for "as soon as possible" requirement for implementing students' IEPs—factors include length of delay, reasons for delay, and steps to overcome it—and rejected incorporation of state 30-day standard

[17] However, the New York regulations have reallocated the burden of proof. See Zirkel checklist, *supra* note 12.

(*P*) ***Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007)**. *But cf.* ***KLA v. Windham Se. Supervisory Union*, 348 F. App'x 604, 54 IDELR ¶ 112 (2d Cir. 2010) (**not for representing IDEA rights of their child, who in this case was incompetent adult)

- parents may proceed *pro se* in federal court to enforce their independent rights under the IDEA

(*P*) ***Fuentes v. Bd. of Educ*., 540 F.3d 145, 51 IDELR ¶ 4 (2d Cir. 2008), *further proceedings*, 569 F.3d 46, 52 IDELR ¶ 152 (2d Cir. 2009)**

- held that whether noncustodial parent retains the right to participate in educational decisions of their child with a disability where the divorce decree grants exclusive custody to the other parent but is silent on the matter of educational decision-making is a matter of state law—affirmed, based on the New York highest court's answer that said parent had no right for education decisions (as compared with education information),[18] the dismissal of the father's FAPE action

(*P*) *Kalliope R. v. New York State Educ. Dep't*, 827 F. Supp. 2d 130, 54 IDELR ¶ 253 (S.D.N.Y. 2010)

- denied dismissal of class action suit claiming that state policy prohibiting the use of a particular student-teacher ratio violated IDEA (and § 504)

S ***A.P. v. Woodstock Bd. of Educ.*, 370 F. App'x 202, 55 IDELR ¶ 61 (2d Cir. 2010)**

- rejected parent's child find claim when district first provided general education interventions (via child study team) prior to evaluation for special education on individualized, not absolute, basis and promptly initiated the evaluation upon the parents presentation of IEE

S ***Bryant v. New York State Educ. Dep't*, 692 F.3d 202, 59 IDELR ¶ 151 (2d Cir. 2012)**

- ruled that state regulation banning aversives did not violate the IDEA, § 504, or the Fourteenth Amendment (due process and equal protection clauses)

[18] *Fuentes v. Bd. of Educ*., 879 N.Y.S.2d 818, 52 IDELR ¶ 164 (2009).

IX. SECTION 504/ADA ISSUES[19]

S ***J.D. v. Pawlet Sch. Dist.* (*supra*)**
- held that proposed IEP for student determined ineligible under IDEA was a reasonable accommodation under Sec. 504

(*P*) ***Weixel v. Bd. of Educ.*, 287 F.3d 138, 36 IDELR ¶ 152 (2d Cir. 2002)**
- preserved for trial whether school officials' actions, including refusal to evaluate, child with CFS and fibromyalgia, violated Sec. 504/ADA (and IDEA)

(***P***) *K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343, 44 IDELR ¶ 37 (S.D.N.Y. 2005).
- preserved for further proceedings whether district was liable for student-to-student disability harassment

(*P*) ***Celeste v. E. Meadow Union Free Sch. Dist.*, 373 F. App'x 85, 54 IDELR ¶ 142 (2d Cir. 2010)**
- upheld jury verdict under the ADA for district's denial of meaningful facilities access to student with cerebral palsy, but vacated its damages award for retrial due to excessiveness

S *A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 58 IDELR ¶ 67 (E.D.N.Y. 2012)
- ruled that requested accommodation of heating up the homemade food of student with diabetes was preferential not necessary for meaningful access to lunch, and in any event the district was not deliberate indifferent—also rejected retaliation claim for lack of evidence and § 504 procedural claims based on harmless error approach

(*P*) *Preston v. Hilton Cent. Sch. Dist.*, __ F. Supp. 2d __, 59 IDELR ¶ 99 (W.D.N.Y. 2012)
- denied dismissal of parents' § 504 claim that district officials were deliberately indifferent to continuing disability-based peer harassment

[19] For a comprehensive two-volume reference that is updated annually, see PERRY ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2011) (available from LRP Publications, www.lrp.com).